

Office of the Presiding Officer
Military Commission

September 21, 2005

SUBJECT: Presiding Officers Memorandum (POM) # 8 - 1, Trial Exhibits

This POM supersedes POM 8 dated 12 AUG 04.

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials.

2. Definitions:

a. Exhibit:

(1) A document or object, appropriately marked, that is presented, given, mentioned, or shown to the Presiding Officer, any other Commission Member, or a witness during a session of the Commission.

(2) A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3) Other documents or objects that the Presiding Officer directs be marked as an exhibit or is marked with the Presiding Officer's permission.

b. Prosecution or Defense Exhibits *for identification* are exhibits sponsored by a party and

(1) Intended to be considered on the merits or sentencing, but either not offered into evidence, or offered into evidence and not received, or

(2) Not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing.

d. Review Exhibits are those exhibits:

(1) Presented for or used on a matter other than the issue of guilt or innocence, or a sentence. Motions, briefs, responses, replies, checklists, written instructions by the Presiding

Officer for the Commission members, findings and sentencing worksheets, and other writings used during motions practice are among the most common form of Review Exhibits.

(2) The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like. *See also* POM #4-3 concerning attachments, and POM #14-1 in regard to the Commissions Library.

e. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual use exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit. An exhibit may be used for a dual use only with the permission of the Presiding Officer, and the exhibit must be properly marked to show both uses.

3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any document or other piece of evidence present in the courtroom which is referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any document or other piece of evidence which is displayed for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record. The parties should be prepared, at trial, to provide hard (paper) copies of PowerPoint presentations and transcripts of audio or audio/video exhibits.

d. When a party marks or offers an exhibit that in its original state was in a language other than English, and the party marking or offering the exhibit has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also mark and provide to opposing counsel an exhibit containing the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form by which a tangible representation of the exhibit shall be included in the record.

f. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, it shall be first shown to the opposing

counsel so that opposing counsel knows the item and its marking, even if the counsel is certain opposing counsel is familiar with the exhibit and its marking.

4. How exhibits are to be marked. *See* enclosure 4.

5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session, except as directed by the Presiding Officer or the Assistant to the Presiding Officer.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That sequence ***IS*** permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: “Let the record reflect that the Prosecution marked, but did not offer, display, or mention, the following Prosecution Exhibits: 3, 6, and 11.” The party will ensure that the reporter retains the marked exhibit, even though it has not been admitted into evidence.

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. Prosecution Exhibit 1 and 3 for Identification are not received. Prosecution Exhibit 2 for Identification is received. Once received, what was Prosecution Exhibit 2 for Identification is now “Prosecution Exhibit 2.” The reporter will mark off the words “for Identification” on the exhibit.

d. Enclosure 4 is a guide for marking trial exhibits.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, “[*(We)*] [*(The Defense)*] [*(The Prosecution)*] offers into evidence

what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of exhibits that have been marked, and in addition with respect to Prosecution and Defense Exhibits, an annotation showing whether an exhibit has been offered and/or received. Before departing the courtroom after the last session of every day, counsel for both sides shall confer with the court reporter to ensure the log is properly annotated, is correct, and that all exhibits are accounted for.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, the Presiding Officer, or other members of the Commission, all exhibits that have been marked shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer, as directed by the CCMC, shall secure all classified exhibits until the next session. As to unclassified exhibits, the court reporter will inventory all exhibits with the Assistant and turn over such exhibits to him until the next session. *See also* paragraph 7, POM #13-1 which also addresses safeguarding exhibits between sessions.

10. Sample forms.

- a. Enclosure 1: Review Exhibits.
- b. Enclosure 2: Prosecution Exhibits.
- c. Enclosure 3: Defense Exhibits.

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

4 Enclosures

- 1. Review Exhibits Log
- 2. Prosecution Exhibits Log
- 3. Defense Exhibits Log
- 4. How to mark exhibits

US v. _____ Page ____ of ____ Pages

US v. _____ Page ____ of ____ Pages

[illegible]

Prosecution Exhibits Log

US v. _____ Page ____ of ____ Pages

[illegible]

Defense Exhibits Log

US v. _____ Page ____ of ____ Pages

US v. _____ Page ____ of ____ Pages

[illegible]

Enclosure 4, Presiding Officers Memorandum # 8-1, Trial Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information

Type of Exhibit	Examples	
	First Page - Single Page Exhibit	Multiple Page Exhibits
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification <i>OR</i> PE 1 for identification <i>OR</i> PE 1 for ID	<i>First page:</i> PE 1 for ID Page, 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification <i>OR</i> DE A for identification <i>OR</i> DE A for ID	<i>First page:</i> DE A for ID, Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Presiding Officer or Reporter will mark through for Identification <i>OR</i> for ID.	<i>First page:</i> Mark through on first page. <i>Subsequent pages:</i> No markings necessary if properly marked as above.
Review Exhibits Use Arabic numbers	Review Exhibit 1 <i>OR</i> RE 1	<i>First page:</i> RE 1, Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 <i>OR</i> Attachment A to RE 3	<i>First page:</i> Attachment 1 to RE 3, page 1 of 3 <i>Subsequent pages:</i> 2 of 3, 3 of 3.

II. Classified Exhibits

Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.

III. Unclassified, Protected Exhibits

Mark the same as I, adding the words on the first page or cover sheet "Protected Information."